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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 6958

LINDA LIEBSCH,

Petitioner,

v.

JACK LIEBSCH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

AMICUS CURIAE BRIEF OF THE STATE OF MARYLAND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Whether the requirement under Maryland Law that an Appellant in a civil appeal pay the costs of preparation of the Transcript of Testimony violated any constitutional right of due process or equal protection of Petitioner, an indigent, who sought to appeal, to the Court of Special Appeals of Maryland, a ruling of the Circuit Court of Anne Arundel County granting custody of her children to their father, where the Circuit Court has continuing jurisdiction to allow additional hearings, from time to time, on the matter of such custody.

STATEMENT OF THE CASE

Petitioner's husband filed a Bill of Complaint for a divorce *a mensa et thoro* and for custody of their minor children in the Circuit Court for Anne Arundel County, Maryland. Petitioner filed a Cross Bill of Complaint, also seeking a divorce *a mensa et thoro* and custody of the children. Following a hearing on the merits, at which petitioner was represented by an attorney, a decree was entered by the Circuit Court granting a divorce *a mensa et thoro*, granting custody of the children to the petitioner's husband, and granting unto petitioner certain visitation rights. Petitioner sought to appeal to the Court of Special Appeals of Maryland and petitioned that Court to have the cost of preparation of the transcript of testimony paid by the state, based on an allegation of indigency. The Petition was denied by the Court of Special Appeals, there being no provision under Maryland Law for the relief sought. A similar Petition filed with the Court of Appeals of Maryland, was denied. Thereafter, petitioner filed her Petition for Writ of Certiorari in this Court. At no time was the State of Maryland made a party to the proceedings.

ARGUMENT

THE REQUIREMENT UNDER MARYLAND LAW THAT AN APPELLANT IN A CIVIL APPEAL PAY THE COSTS OF PREPARATION OF THE TRANSCRIPT OF TESTIMONY DID NOT VIOLATE ANY CONSTITUTIONAL RIGHT OF DUE PROCESS OR EQUAL PROTECTION OF PETITIONER, AN INDIGENT, WHO SOUGHT TO APPEAL TO THE COURT OF SPECIAL APPEALS OF MARYLAND A RULING OF THE CIRCUIT COURT OF ANNE ARUNDEL COUNTY GRANTING CUSTODY OF HER CHILDREN TO THEIR FATHER, WHERE THE CIRCUIT COURT HAS CONTINUING JURISDICTION TO ALLOW ADDITIONAL HEARINGS, FROM TIME TO TIME, ON THE MATTER OF SUCH CUSTODY.

Petitioner relies in part on prior decisions of this Court involving criminal appeals and also on *Boddie v. Connecticut*,

401 U.S. 371 (1971). A clear distinction, however, can be made between these authorities and the present case. With respect to criminal cases, starting with *Griffin v. Illinois*, 351 U.S. 12 (1956), it must be conceded that a right of an indigent criminal defendant to be provided a transcript of testimony is generally recognized. However, the criminal cases involve litigation directly between an indigent defendant and the state, whereby a defendant has been involuntarily required to defend himself against a charge brought by the state. Since it is the state which has initiated the proceedings and brought the defendant within the judicial system, it has repeatedly been held that the state cannot then arbitrarily cut off all appeal rights for indigents while leaving open avenues of appeal for more affluent persons. Mr. Justice Black in his dissent in *Boddie*, stated:

> "Criminal defendants are brought into court by the State or Federal Government to defend themselves against charges of crime. They go into court knowing that they may be convicted, and condemned to lose their lives, their liberty, or their property, as a penalty for their crimes. Because of this great governmental power the United States Constitution has provided special protections for people charged with crime. They cannot be convicted under bills of attainder or ex post facto laws. And numerous provisions of the Bill of Rights — the right to counsel, the right to be free from coerced confessions, and other rights — shield defendants in state courts as well as federal courts. See, *e.g.*, Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969); Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); Mallov v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). With all of these protections safeguarding defendants charged by government with crime, we quite naturally and quite properly held in *Griffin* that the Due Process and Equal Protection Clauses both barred any discrimination in criminal trials against poor defendants who are unable to

> defend themselves against the State. Had we not so held we would have been unfaithful to the explicit commands of the Bill of Rights, designed to wrap the protections of the Constitution around all defendants upon whom the mighty powers of government are hurled to punish for crime."

In *Boddie* access to the courts, even at the trial level, was completely denied an indigent party seeking to obtain a divorce in the only manner permitted by law, that is, by a court decree. It must be emphasized that petitioner in this case was not denied access to the court. Her case was heard on the merits, considered and ruled upon by the Circuit Court for Anne Arundel County. Indeed, Maryland Law expressly provides for waiver of court costs in case of indigency at the circuit court level. See Section 7-201, Courts and Judicial Proceedings Article, Annotated Code of Maryland (1974) (See Appendix A). In addition to being granted initial access to the court, other relief remained available to petitioner. It is well established in Maryland that a ruling concerning the custody of children is not *res judicata.** The court has continuing jurisdiction over the matter of custody. *Taylor v. Taylor*, 229 A.2d 131 (Md. 1966). Petitioner, therefore, will have continuing access to the Circuit Court to relitigate the issue of custody and to present additional evidence and arguments in connection therewith. Furthermore, other possible appellate avenues were open to petitioner. If the claimed error sought to be reversed on appeal was an error of law, petitioner might have been able to proceed on a Statement of Case In Lieu of Pleadings and Evidence under Maryland Rule of Procedure 1026 (g) (See Appendix B).

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* As noted in the Statement of the Case, both petitioner and her husband each sought a divorce *a mensa et thoro* in addition to custody of the children. Since a divorce *a mensa et thoro* was granted, it is apparent that petitioner's appeal sought to review only the custody question.

Mayer v. City of Chicago, 404 U.S. 189 (1971). Petitioner has not made any representation that this would not be feasible. Still another appellate procedure in which a transcript of testimony would not be required would be an appeal to the circuit judges *en banc* under Article IV, Section 22 of the Maryland Constitution (See Appendix C.)

In any event, petitioner's position is either not supported by, or runs contrary to, recent rulings of this Honorable Court. In *Boddie*, this Court, at Page 382, was careful to emphasize that it was not deciding that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the 14th Amendment. In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), this Court recognized that at least where wealth is involved the Equal Protection Clause does not require absolute equality or precisely equal advantages. More directly on point is *Lindsey v. Normet*, 405 U.S. 56 (1972) where this Court again recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the 14th Amendment does not require the state to provide appellate review. In that case, at Page 76, it was stated that a condition on a tenant's right to appeal such as the requirement of normal appeal bond would not raise serious constitutional questions. It should be noted that Petitioner in this case is not alleging that she was denied a full and fair trial on the merits. In *Ortwein v. Schwab*, 410 U.S. 656 (1973) this Court rejected the claim of an indigent in the State of Oregon that a filing fee on an appeal violates the equal protection clause by unconstitutionally discriminating against the poor. See also *McCray v. Afro-American of Baltimore*, Unreported, U.S. District Court for the District of Maryland 1974 (Appendix D). The requirement of Maryland Law with respect to the transcript can also be supported on another basis. This Court has re-

peatedly held that a party does not have a right, guaranteed by the constitution to an appeal. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Ross v. Moffit*, No. 73-786, 42 L.W. 4940 (June 17, 1974). In *U. S. v. Kras*, 409 U.S. 434 (1973) it was held that the proper basis on which to judge the constitutionality of a state law is "rational basis" rather than "compelling governmental interests", unless the law impinges upon a fundamental right guaranteed by the constitution. Since, as noted above, the right of appeal is not a fundamental one guaranteed by the constitution, the Maryland Law must be sustained against attack on constitutional grounds if it is supported by a rational basis, and the reasonableness of requiring a person wishing to take an appeal to pay for the costs of having the transcript of testimony prepared, in civil cases not involving a state as a party, is self-evident.

Of great importance in this case would be the precedent which would be established by granting petitioner the relief requested. The extent to which such precedent would lead cannot readily be determined; but of necessity, it would have an extremely far-reaching effect upon the judiciary, state and federal, whereby the courts, including this Honorable Court, would have the burden of making available the expenses of civil appeals for countless litigants.

It is respectfully suggested that this case is not the appropriate one in which this Court should address this weighty and difficult problem since, as noted previously, the courts of Maryland, at the circuit level, remain open to Petitioner to give reconsideration to the issue of custody of her children.

CONCLUSION

The State of Maryland as *amicus curiae* respectfully requests this Honorable Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,

FRANCIS X. PUGH,
Assistant Attorney General
of Maryland,

For Amicus Curiae.

APPENDIX A

§ 7-201. Payment and waiver of costs.

(a) *Payment of fee required.* — Except for an appeal from an administrative agency or civil appeal from the District Court, no case at law or in equity may be docketed and no writ of attachment, fieri facias, or execution on judgment may be issued unless the plaintiff or appellant pays a fee as set forth in §§ 7-202 and 7-203.

(b) *Waiver in case of indigency.* — A court shall pass an order waiving the payment if:

(1) Upon petition for waiver, it is satisfied that the petitioner is unable by reason of his poverty to make the payment; and

(2) The petitioner's attorney, if any, certifies that the suit, appeal, or writ is meritorious.

APPENDIX B

g. *Statement of Case in Lieu of Pleadings and Evidence.*

When the questions presented by an appeal can be determined by this Court without an examination of all the pleadings and evidence, the parties with the approval of the lower court may prepare and sign a statement of the case showing how the questions arose and were decided, and setting forth so much only of the facts alleged and proved, or sought to be proved, as is essential to a decision of such questions by this Court. Such statement, when filed with the clerk of the lower court shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the judgment from which the appeal is taken and any opinion of the lower court, and, together with such judgment and opinion, shall be certified to this Court as the record on appeal.

APPENDIX C

Section 22. Reservation of points or questions for consideration by court in banc.

Where any Term is held, or trial conducted by less than the whole number of said Circuit Judges, upon the decision

or determination of any point, or question, by the Court, it shall be competent to the party, against whom the ruling or decision is made, upon motion, to have the point, or question reserved for the consideration of the three Judges of the Circuit, who shall constitute a court in *banc* for such purpose; and the motion for such reservation shall be entered of record, during the sitting, at which such decision may be made; and the several Circuit Courts shall regulate, by rules, the mode and manner of presenting such points, or questions to the Court in *banc*, and the decision of the said Court in *banc* shall be the effective decision in the premises, and conclusive, as against the party, at whose motion said points, or questions were reserved; but such decision in *banc* shall not preclude the right of Appeal, or writ of error to the adverse party, in those cases, civil or criminal, in which appeal, or writ of error to the Court of Appeals may be allowed by Law. The right of having questions reserved shall not, however, apply to trials of Appeals from judgments of Justices of the Peace, nor to criminal cases below the grade of felony, except when the punishment is confinement in the Penitentiary; and this Section shall be subject to such provisions as may hereafter be made by Law.

APPENDIX D

In The United States District Court
For The District Of Maryland

Civil Action No. N-74-586

Milton McCray,

v.

Afro American of Baltimore.

MEMORANDUM AND ORDER

On May 29, 1974, this Court received from its most prolific prisoner litigant, Milton McCray, a one page pleading relating to a case recently tried in state court. The pleading.

entitled "Motion for Leave to Proceed In Forma Pauperis", recites that on January 2, 1974, the case of *McCray v. Afro American*, a libel suit, was tried before a jury in the Circuit Court for Baltimore County. A directed verdict for the defendant was granted at the conclusion of the plaintiff's case. Upon denial of a motion for a new trial, McCray took an appeal to the Court of Special Appeals of Maryland. On April 23, 1974, the Court of Special Appeals dismissed the appeal because, according to McCray, he was unable to pay the costs of appeal. Thereafter on April 29th, the plaintiff filed a motion for leave to proceed in forma pauperis, which was denied four days later. McCray now asks this Court to enter an order allowing him to file an appeal in forma pauperis to the Court of Special Appeals of Maryland.

An indigent does not have the constitutional right to proceed in forma pauperis in an appeal of a civil case. The Supreme Court of the United States recently held that a state appellate court's filing fee, which was a condition precedent to a right of appeal in civil cases, does not violate the due process clause of the fourteenth amendment when applied to an indigent appellant. *Ortwein v. Schwab*, 410 U.S. 656 (1973).

This motion is yet another example of the never-ceasing attempts of prisoner litigants to interject the federal courts into private controversies, the proper forums of which are the state courts. A federal court is not a panacea for all of society's ills. This Court is tired of expending valuable time and energy on such patently frivolous prisoner petitions as the instant one.

It is, therefore, this 7th day of June, 1974, ORDERED:

1. That the Clerk docket the above-entitled case without payment of the filing fee; and

2. That the within case BE, and the same hereby Is, DISMISSED.

3. That the Clerk mail a copy of this Memorandum and Order to the plaintiff.

EDWARD S. NORTHROP,
Chief United States District Judge.